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First Amendment Basics[1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. I.

The rights protected by the First Amendment are some of the most cherished rights described in the U.S. Constitution, though people often have conflicting perspectives on how far those rights extend. The First Amendment addresses five major rights. Four are regularly raised in the context of community colleges: free speech, freedom of religion, freedom of assembly, and right to petition. First Amendment jurisprudence also addresses freedom of association and privacy rights, two relevant concepts not expressly stated in the First Amendment.

The First Amendment applies to universities through the Fourteenth Amendment Due Process Clause. *Widmar v. Vincent*, 454 U.S. 263 (1981) (speech and association); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (establishment); *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011) (freedom of religion); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (assembly); *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984) (petition); *Justice for All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005) (privacy).

Plaintiffs may sue the government for violations of the First Amendment through Section 1983, 42 U.S.C. § 1983.

Freedom of Speech

The First Amendment Free Speech Clause is one of the most discussed and litigated First Amendment protections, but the extent of its protections is often misunderstood. Campus communities must determine the appropriate, and permissible, limits on controversial speech.

Q: What types of expression are protected by the Free Speech clause?

A: The free speech protections apply to pure speech. *Pure speech* is oral and written expression, including spoken **commentary**, pamphlets, and messages on signs. *Spence v. Washington*, 418 U.S. 405 (1974).

[1] An electronic version of this document is available on TASB College eLaw at tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/cc-first-amendment-basics.pdf.

The protections also apply to expressive conduct and symbolic speech. *Expressive conduct and symbolic speech* are actions or conduct intended to convey a message, such as wearing a cross, flying a confederate flag, or participating in sit-ins. To be protected, the person engaging in expressive conduct and symbolic speech must intend to convey a particularized message, and there must be a great likelihood that the message will be understood by those observing it. *Spence v. Washington*, 418 U.S. 405 (1974).

The First Amendment protections do not extend to all speech, expressive conduct, or symbolic speech, however. The protections also do not extend to lewd or obscene speech, fighting words, defamation, inciting imminent criminal activity, true threats, extortion, and plagiarism. *Virginia v. Black*, 538 U.S. 343 (2003); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Miller v. California*, 413 U.S. 15 (1973); *The New York Times v. Sullivan*, 376 U.S. 254 (1964); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942).

Q: *May a community college place boundaries on where campus visitors may speak?*

A: Free speech protections do not apply in all governmental settings simply because they are owned or controlled by the government. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). The degree to which the Free Speech Clause applies depends on the forum created by the government.

Courts have defined four different types of forums: traditional, designated, limited, and non-public. *Chiu v. Plano Indep. School Dist.*, 260 F.3d 330 (5th Cir. 2001). A *traditional public forum* includes locations, such as sidewalks and parks, where members of the public have historically been permitted to gather and speak on any topic. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985). Courts have generally concluded that community college property is not a traditional public forum, with the exception of sidewalks, streets, and parks that are indistinguishable from surrounding city property. *Widmar v. Vincent*, 454 U.S. 263 (1981); s*ee, e.g.*, *Brister v. Faulkner*, 214 F.3d 675 (2000) (concluding that the sidewalk area between a university event center and city street was a traditional public forum because it was indistinguishable from city property).

Even in the rare situation where college property is deemed a traditional public forum, the entity may exclude particular content if that entity can assert a compelling governmental interest that is narrowly tailored to address that interest, a standard referred to as the *strict scrutiny* standard. The college can also enforce viewpoint-neutral time, place, and manner restrictions to meet a compelling governmental interest if a sufficient number of alternative communication channels are available. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

A *designated public forum* is a forum that a community college intentionally opens to the general public to discuss matters of public concern. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985). Like in the case of a traditional public forum, once designated, a college may enforce reasonable time, place, and manner restrictions. *Widmar v. Vincent*, 454 U.S. 263 (1981). Any content limitations are subject to the strict scrutiny standard. *Chiu v. Plano Indep. School Dist.*, 260 F.3d 330 (5th Cir. 2001).

A *limited public forum* is a forum that a community college opens to a particular group of speakers or for discussion regarding a particular topic. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Within a limited public forum, limits on expression must be viewpoint-neutral and reasonable in light of the purpose of the forum. The government may impose reasonable time, place, and manner restrictions, as long as these restrictions do not relate to the content of the expression. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

To distinguish between a designated public forum and a limited public forum, courts consider two factors: (1) the intent of the community college regarding the forum, and (2) the forum's nature and compatibility with particular speech. The distinction is important because it decides whether the strict scrutiny or reasonableness standard is applied to a limitation on speech imposed by the college or university. *Chiu v. Plano Indep. School Dist.*, 260 F.3d 330 (5th Cir. 2001). Note, a college may establish a designated public forum with respect to some speakers and types of speech and a limited public forum for others. *Justice for All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005).

If a community college or university has not opened a public forum, it remains a *nonpublic forum*. Although limits on expression must be reasonable and viewpoint neutral even within a nonpublic forum, a college will have greater discretion to control the content of speech within such a forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

Q: May a community college discipline an employee, including a faculty member, for the employee's speech?

A: **Employees generally:** Generally, the level of protection a community college employee's speech enjoys depends on whether the speech is part of the employee's official duties, speech on a matter of public concern, or speech on a matter of private concern. The U.S. Supreme Court held in *Garcetti v. Ceballos* that a public employer may regulate employee speech that is made pursuant to the employee's job duties. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). This restriction may be similarly applied to speech that is merely related to the employee's job duties. *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007). If the speech is not part of the employee's job duties, but relates to a matter of public concern, a public employer must balance the employee's right to free speech with the employer's interest in maintaining the

efficiency of its operations. *Pickering v. Bd. of Educ. 205*, 391 U.S. 563 (1968). Whether the speech is a matter of public concern should be determined by the content, form, and context of a given statement. If the speech involves a matter that is of private, not public, interest, the employee will not be entitled to First Amendment protection. *Connick v. Myers*, 461 U.S. 138 (1983).

In determining whether speech is work-related, factors include:

- the scope of the employee's job responsibilities as indicated in policies or job descriptions created by the employer;
- any statutory authority which assigns particular job responsibilities to the employee;
- whether speech was directed within the employee's chain of command; and
- evidence that the employee did or did not engage in certain activity as a result of the employee's job, regardless of formal responsibility or authority.

Van Deelen v. Cain, 628 F. App'x 891 (5th Cir. 2015) (per curiam).

Faculty: Community college faculty do not shed all of their First Amendment rights simply by working with the college. *Healy v. James*, 408 U.S. 169 (1972). However, their capacity as public employees will subject faculty to restrictions not applied to other citizens. Generally, the analysis should be divided into two categories: faculty speech outside of relevant scholarship and instruction and faculty speech while engaging in scholarship or instruction on the subject matter of the faculty member's focus.

The U.S. Supreme Court in *Garcetti* acknowledged that faculty may have a right to academic freedom protected by the First Amendment but failed to define the parameters of that protection. Since that time, lower courts generally have recognized the *Garcetti* reservation but have tightly carved out the exception, distinguishing between scholarship and instruction germane to the subject matter and other job duties. *See, e.g.*, *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009) (concluding a professor's advice to a student athlete regarding discipline matters and cancellation of the university president's speech to a committee the professor managed was speech made pursuant to his job duties but did not involve academic freedom concerns); *Piggee v. Carl Sandberg Coll.*, 464 F.3d 667 (7th Cir. 2006) (concluding a cosmetology instructor's distribution of pamphlets describing the sinfulness of homosexuality to a gay student was not germane to the subject matter of the course and therefore not protected speech); *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) (concluding a professor's excessive profanity used out of anger and directed at the students was not germane to the classroom discussion and therefore not protected speech).

Q: May a community college discipline a student for the student's speech?

A: Historically, student speech has been perceived as having broad protections consistent with the concept that a higher education campus is a "marketplace of ideas". *Healy v. James*, 408 U.S. 169, 180 (1972). However, the protections are not absolute.

An emerging area of litigation relates to the application of professional standards of conduct to restrict the speech of students. Many community colleges require students enrolled in professional programs, such as nursing, to comply with the recognized standards of the profession or face discipline up to and including expulsion from the program. Courts have concluded that the colleges have discretion to require compliance with the standards if the application of the standards is reasonably related to legitimate pedagogical concerns, even if the alleged violation relates to off-campus speech. *E.g.*, *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016) (concluding that the expulsion of a nursing student for Facebook posts found to be in violation of the nursing code of ethics did not infringe on the student's free speech rights); *Tatro v. Univ. of Minn.*, 816 N.W.2d (Minn. 2012) (concluding a university did not violate the free speech rights of a mortuary student when sanctioning the student for Facebook posts found to be in violation of professional standards).

Q: Is a college's speech regulated by the First Amendment?

A: Government speech is not regulated by the First Amendment. To determine if speech is government speech, courts consider if the entity maintains effective control over the speech, the history of the form of speech, and if the public has a common understanding that the speech is intended to convey a message of the entity. The fact that the government has engaged in speech does not open a forum for public participation. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (concluding that, by approving monuments submitted by outside entities for installation in a city park, a city engaged in government speech and did not open a forum for public speech).

Q: May a community college require a person to financially support a person's speech?

A: The freedom of speech protects not only what a person chooses to say but what a person chooses not to say. The First Amendment therefore prohibits a governmental entity from requiring an individual to financially support a private person's expression with which the individual disagrees. The First Amendment does not prohibit the government from requiring an individual to subsidize speech that satisfies a substantial public interest, however. In the context of community colleges, courts must consider whether the speech advances a significant educational purpose in a

manner that is narrowly tailored. *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992) (concluding a university may fund a student newspaper using mandatory student fees because the university's goals, including providing students practical journalism experience and the exchange of ideas, were significant enough to justify the student fee subsidy and the financing scheme was narrowly tailored).

Freedom of Religion

The First Amendment includes two clauses intending to provide balance so that governmental entities are not excessively entangled in religious matters: the establishment clause and the free exercise clause. U.S. Const. amend. I. The U.S. Supreme Court has also held that private religious speech is protected under the Free Speech Clause. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

Establishment of Religion

The Establishment Clause prohibits governmental entities from establishing a religion. U.S. Const., Amend I. Courts have generally read this protection to mean that a governmental entity, including a community college, must be neutral toward religion. It must not advance, coerce, or endorse a particular religion or religion over non-religion. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

Q: How may a court determine if a community college violated the Establishment Clause?

A: Courts use different tests to determine whether a governmental entity has violated the Establishment Clause. The first test is referred to as the *Lemon* test from *Lemon v. Kurtzman*. The Lemon test applies three factors. To avoid an establishment of religion, government action must: have a secular purpose; not have a primary effect of advancing or inhibiting religion; and not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The *Lemon* test has not been overruled outright; however, the U.S. Supreme Court has developed other tests. One such test is referred to as the endorsement test. The endorsement test basically asks whether the governmental entity conveyed to a reasonable observer that the religion was either favored or disapproved. *Lynch v. Donnelly*, 465 U.S. 668 (1984). The endorsement test is often used in cases involving government expression.

Use of government funds are typically subject to a neutrality test. The neutrality test involves providing aid to different entities or individuals without favoring or disfavoring a particular viewpoint. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Q: May a community college permit a religious leader to pray at graduation?

A: The Seventh Circuit Court of Appeals has held that a religious leader can lead a nonsectarian prayer at graduation. In the case *Tanford v. Brand*, faculty and students at Indiana University-Bloomington sued university officials to enjoin the invocation and benediction scheduled to take place at graduation. The university selected a leader from a different faith each year to conduct the prayer. The faculty and students claimed that the prayer violated the Establishment Clause. The university responded that the purpose of the ceremony was not to endorse a particular religion but instead to emphasize the solemn nature of the ceremony. *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997).

The court found the fact that the students attending the graduation were adults to be a significant distinction from prior graduation prayer cases, such as *Lee v. Weisman*, 505 U.S. 577 (1992), that involve young students who are more sensitive to religious coercion. The court noted that the students were not a captive audience but were instead free to come and go from the ceremony. The court then applied the *Lemon* test as this speech involved expressive conduct. The court found the prayer to serve the purpose outlined by the college. As the prayer was brief and the university simply told the religious leader to conduct a unifying and uplifting prayer, the possibility of religious entanglement was at most *de minimis*. The court affirmed the lower court's denial of the injunction. *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997).

Q: May a community college use public funds for religious speech by student organizations?

A: In the case, *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, a student organization sued the University of Virginia alleging violations of the organization's free speech rights after the university declined to pay the printing costs for the organization's newspaper. The university argued that it was required by the Establishment Clause to decline to make the payment because the newspaper promoted particular religious beliefs. *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

As the case involved the use of government funds, the U.S. Supreme Court applied the neutrality test regarding the university's Establishment Clause defense. The Court determined that the university created the forum for student news, entertainment, and media groups, not to advance a particular religion. Under this rubric, the organization pursued funding as a student communications group, not a religious group. *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

The Court noted that the funds supporting the organization did not equate to a government tax imposed to fund a church, a clear Establishment Clause violation. The funds were raised from a student fee directed for use by approved student organizations for a wide range of expression. Additionally, the Court found it

significant that a third party was involved, as the funds were paid to the printer, not to the organization. The university was therefore not directly funding a religious organization. *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

Further, the Court noted that the university took steps to distance itself from the speech of the student organizations, requiring that the organizations include disclaimers in their publications. Ultimately, the Court did not find a distinction between providing funds on a religion-neutral basis and providing neutral access to university facilities. As the university's funding scheme was neutral toward religion, the Court, therefore, concluded that the Establishment Clause did not require that the university decline funding of the student organization. *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

Free Exercise of Religion

The First Amendment Free Exercise Clause prohibits districts and their employees from unduly burdening citizens' free exercise of religion. U.S. Const., Amend. I. The Free Exercise Clause prohibits the government from passing laws or establishing practices that specifically target adherents of particular faiths. Under the federal Free Exercise Clause, the government may, however, adopt and apply neutral, generally applicable laws and practices. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

Courts apply a neutrality inquiry regarding allegations of free exercise violations. First, courts consider whether a governmental law or regulation is neutral, meaning whether the governmental law or regulation is intended to infringe upon religious practices because of these practices religious motivation. Then courts consider whether the law or regulation is of general applicability, meaning that the law or regulation selectively burdens religiously motivated conduct. A law or regulation that satisfies this inquiry is subject to a rational basis review, whereby the plaintiff must prove the law or regulation at issue is not rationally related to a legitimate governmental interest. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

Q: Does the free exercise clause protect student expression in instructional settings?

A: In *Keeton v. Anderson-Wiley*, Keeton was pursuing her master's degree in school counseling at Augusta State University. Keeton, a Christian who believed homosexuality to be a lifestyle choice and gender to be fixed, shared with her instructors her difficulty working with homosexual, bisexual, transgender, and questioning populations. Keeton stated that she intended to attempt to change the behavior of a client who stated he or she was homosexual. Concluding that Keeton's statements constituted Keeton's expressed intent to violate the American Counseling Association's (ACA) Code of Ethics, the university required Keeton to participate in a

remediation plan or be dismissed from the program. Keeton sued the university and filed a motion to enjoin the application of the remediation plan, alleging that the university told her she would have to alter her personal religious beliefs in violation of her free speech and free exercise rights. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

The Eleventh Circuit Court of Appeals first addressed Keeton's free speech claim. The court determined that the counseling program was a nonpublic forum subject to reasonable and viewpoint neutral restrictions. The court concluded based on the evidence that the remediation requirement stemmed from Keeton's stated intention to impose her own religious views on her clients in violation of the ACA Code of Ethics. Statements from the university expressed a neutral desire to help her become a better counselor. Further, the ACA Code of Ethics applied to all of the students in the program regardless of viewpoint. The requirements were therefore viewpoint neutral. The requirements were also reasonable as the ACA Code of Ethics was based in research regarding what may be deemed an effective counseling practice. The court concluded that the university, seeing the potential deviation from the counseling program requirements, did not need to wait until Keeton was actually practicing individual counseling to initiate remediation. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

The court rejected Keeton's argument that a public school precedent applied to her claim. The court noted that, unlike public school students, Keeton was free to choose not to attend the university or to choose a different career. Keeton agreed to comply with the ACA Code of Ethics upon choosing to enroll in the program. Further, the court found that the university was not forcing Keeton to express a particular belief but instead was requiring that she comply with the ACA Code of Ethics provisions regarding the separation of personal beliefs from work. Finally, the court noted an institution of higher education's academic decisions are subject to significant deference from the courts. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

In rejecting Keeton's free exercise claims, the court applied much of the logic mentioned above regarding Keeton's free speech claim to conclude that her free exercise rights were burdened. However, the court concluded that the academic requirements satisfied the neutrality inquiry as the ACA Code of Ethics was not adopted to infringe on religious practices because of their intrinsic motivation but instead so that the university could offer an accredited program. In addition, the academic requirements applied to all students, not just those of a particular religious belief. For these reasons, the court affirmed the lower court's denial of the preliminary injunction. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

Freedom of Assembly and Association

Individuals are guaranteed the right to peaceably assemble by the First Amendment. Though the right is fundamental and has supported many movements throughout history—including the civil rights movement, women's suffrage movement, and the occupy movement—the right to assemble has generally been subsumed by the other protections provided by the First Amendment. Often this line of thought morphs into what is deemed the freedom of association. U.S. Const., amend. I.; *De Jonge v. Oregon*, 299 U.S. 353 (1937).

Q: What is the freedom of association?

A: The right of association is not expressly included in the text of the First Amendment. Instead, the right has developed through court cases by combining the First Amendment speech, assembly, and petition rights. A person may choose to associate with others for any variety of reasons, be it political, social, cultural, religious, educational, or another reason. *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

The freedom of association was first referenced in *NAACP v. Alabama*, 357 U.S. 449 (1958). Since that time, courts have recognized two types of association, intimate and expressive. *Intimate association* is determined by reviewing the size, purpose, and selectivity of the organization. *Expressive association* is achieved by the group engaging in a form of expression. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

Typically, the U.S. Supreme Court applies a strict scrutiny standard to any constraints on the freedom of association. However, the Court has recognized that the freedom of expressive association is closely linked to the freedom of speech. If both rights are implicated in the same context as a limited public forum, the Court has applied the same standard of scrutiny to constraints on those rights. In that context, any barrier to access to the forum must be reasonable and viewpoint neutral. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010).

Q: May a student organization be denied recognition by a community college based on affiliation?

A: In *Healy v. James*, the Students for a Democratic Society (SDS) were denied status as a recognized student organization by Central Connecticut State College due to the college's concern that the organization maintained a relationship with the national SDS organization, a group that had a history of disruption, despite the local organization's claims to the contrary. Members of SDS sued college officials, alleging violations of the members' freedom of association. *Healy v. James*, 408 U.S. 169 (1972).

The U.S. Supreme Court determined that the fact that the college declined to recognize SDS burdened the members' associational rights as it denied them access to campus facilities for meetings. The denial also restricted the members' access to methods of communication, such as the campus newspaper and bulletin boards, that were necessary for the organization to remain viable and to participate in campus debate. Because of this burden on the members' rights, the college was required to justify the appropriateness of the decision to deny recognition. Certainly, the college could not sanction the group solely because of the assumed association with the national organization alone. Nor could the college justify the denial because the college did not approve of the organization's viewpoint. If, however, the college could show that SDS itself incited, or was likely to incite, imminent lawless action, then that justification could serve as a compelling governmental interest to deny official recognition of SDS. A restriction would similarly be justified if the members of SDS did not intend to follow the college's conduct rules. The Court found no evidence justifying the former but did raise questions as to the latter, so the Court reversed the decision of the lower court and remanded the case. *Healy v. James*, 408 U.S. 169 (1972).

Right to Petition

The First Amendment protects an individual's right to petition the government for the redress of grievances. U.S. Const., Amend I. Though the action of petition has a strong history of practice, through picketing, letter writing campaigns, testifying before the legislature, ballot initiatives, and other methods, the Petition Clause is rarely discussed in depth by the courts. Instead, as this right involves expression, cases that involve the right to petition are typically decided within the rubric of free speech jurisprudence.

Q: What actions are protected by the right to petition?

A: The right to petition does include the right to sue a governmental entity; however, lawsuits are not the only method of petition. The right applies to petitions lodged through both formal and informal procedures. Though the right does require that public entities provide a method for individuals to petition, the U.S. Supreme Court has concluded that neither the Petition Clause, nor any other First Amendment protection, requires that governmental policymakers actually listen to an individual's grievances or respond to those particular concerns. *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011); *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984); *see also*, *Brown v. Louisiana*, 383 U. S. 131 (1966) (describing a sit-in at a segregated reading room as a petition to the government for a redress of grievances).

Q: What issues are protected by the right to petition?

A: A community college employee has the right to petition only on a matter of public concern. Similar to free speech concerns, petitions may interfere with effective governmental operations; therefore, colleges have an interest in reining in employees whose exercise of their petition rights complicate progress toward their job goals. Additionally, petitions brought through lawsuits may require significant investments of time and resources by community colleges and potentially subject colleges to excessive judicial oversight. To determine whether a petition involves a public or private concern, a community college should consider the forum in which a petition is lodged. *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011).

Internal workplace conflict is not considered a matter of public concern, even if the workplace is a public entity, where theoretically all business is of some interest to the public. When an employee expresses dissatisfaction with how the public employer operates, the speech is generally considered a personal matter, even if the information is shared publicly. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 399 (2011). Consequently, most workplace complaints and grievances are not protected by the First Amendment.

Note that the public concern test does not apply to petitions by members of the public. However, the *Pickering* balancing test, discussed above, does apply to employees who are petitioning on matters of public concern. *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011).

Right to Privacy

The U.S. Supreme Court has recognized that, though not expressly stated, the First Amendment provides individuals a right to privacy through a protection for anonymous expression, association, and belief. The Court found the protection to be significant as anonymity protects those who wish to engage in peaceful discussions of matters of public concern from the fear of reprisal. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Talley v. California*, 362 U.S. 60 (1960).

Q: Does the First Amendment protect anonymous literature distribution?

A: Courts have extended this provision The First Amendment right to privacy extends to anonymous literature distributed at Texas community colleges. In the case *Justice for All v. Faulkner*, Justice for All challenged a University of Texas at Austin policy requiring that literature distributed on campus include the name of the person or organization responsible for its distribution and that the person or organization be affiliated with the university. The organization alleged that the regulation violated the

students First Amendment right to anonymously distribute literature on campus. The university responded that the regulation was intended to ensure campus use was properly limited to students, faculty, and staff. *Justice for All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005).

The Fifth Circuit Court of Appeals recognized that because university property may be limited for use by certain individuals, a student distributing literature on a university campus is not guaranteed full anonymity in all cases. However, the limited anonymity a student retains is subject to First Amendment protections. The court determined that the university had created a designated public forum, subject to the strict scrutiny standard, as defined above, because the university regulations required that the restrictions on speech in the areas at issue be viewpoint neutral and generally content neutral. Applying that standard, the court found that the university's stated desire to preserve the campus for student use and prevent non-affiliated persons or groups from distributing literature on campus was a compelling interest, despite the absence of similar restrictions on anonymous picketing. The court concluded that the university regulations were not narrowly tailored because the government interest in forum preservation could be pursued without requiring students to identify themselves to everyone. The court suggested that instead the university could have established a system for individuals distributing literature to identify themselves as students only to university officials. *Justice for All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005).

Q: Does the First Amendment protect anonymous copyright infringement?

A: The First Amendment does not extend privacy protections to activities that infringe on copyrights. In *Arista Records, LLC v. Doe 3*, students moved to quash a subpoena issued by several recording companies requesting identifying information from their Internet service provider, the State University of New York at Albany, as part of a copyright infringement lawsuit. The students argued that the First Amendment protected their right to use the Internet anonymously. The court concluded that, though the First Amendment does provide privacy protections, the First Amendment does not grant individuals the right to infringe on others' copyrights. Such acts outweigh the First Amendment privacy protections. The court concluded that the recording companies had alleged enough facts to render their copyright infringement claims plausible and denied the students' motion. *Arista Records, LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2011).